Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

OCTOBER TERM, 1995

JOHN M. MERRETT, and CECILIA A. CLAYTON, as personal representative of the estate of SOLOMON CLAYTON, JR., on their own behalf and on behalf of all others similarly situated, PETITIONERS

v.

JAMES T. MOORE, as Commissioner of the Florida Department of Law Enforcement, ROBERT DEMPSEY, individually FRED O. DICKINSON, as Executive Director of the Florida Department of Highway Safety and Motor Vehicles, ROBERT BUTTERWORTH, and LAWRENCE CROW, JOHN M. ERWIN, and JERALD VAUGHN, CITIES OF LAKELAND, MAITLAND, AND LARGO POLICE DEPARTMENTS, RESPONDENTS

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI

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10 pp

TABLE OF CONTENTS

Reasons for Granting the Writ 1

I. The Court Has Recently Granted Certiorari In A Case Where The Decision May Substantially Impact On This Case And A Decision In This Case Could Impact That Case; Certiorari Should Be Granted To Consider The Matters Together 1

Conclusion 8

TABLE OF CITED AUTHORITIES

Cases

Berkemer v. McCarthy, 488 U.S. 420(1984) 7

Florida v. Royer, 460 U.S. 491 (1983) 5

Terry v. Ohio, 392 U.S. 1 (1968) 5

U.S. v. Botero-Ospina, 71 F.3d 783 (10th Cir. 1995)(en banc) 6

U.S. v. Johnson, 63 F.3d 242 (3rd Cir. 1995) 7

Warden v. Hayden, 387 U.S. 294 (1967) 5

Whren v. United States, 53 F.3d 371 (D.C.Cir. 1995), *cert. granted*, Sup. Ct. No. 95-5841 (1996) ..... passim

Other Authorities

Stern, Grossman, Shapiro & Geller, *Supreme Court Practice* (7th ed. 1993) 1

REASONS FOR GRANTING THE WRIT

I. The Court Has Recently Granted Certiorari In A Case Where The Decision May Substantially Impact On This Case And A Decision In This Case Could Impact That Case; Certiorari Should Be Granted To Consider The Matters Together

Just after Petitioners submitted this petition, Petitioners learned that the Court had recently granted certiorari in a case involving some closely related issues. *Whren v. United States*, 53 F.3d 371 (D.C.Cir. 1995), *cert. granted*, Sup. Ct. No. 95-5841(Jan 5,1996). The outcome of *Whren* could substantially impact on the outcome of the case at bar and the outcome of this case could substantially affect *Whren*.

The Court's grant of certiorari in *Whren* demonstrates the importance of the issues presented herein:

> Where the petition for certiorari presents a question that is identical with, or similar to, an issue already pending before the Supreme Court in another case in which certiorari has been granted, the issue is obviously important and the Court will either grant the petition and set the cause for argument or postpone consideration of the petition until the other case has been decided and then make summary disposition of the case in accordance with that decision.

Stern, Grossman, Shapiro & Geller, *Supreme Court Practice* (7th ed. 1993) at pp. 192-93. Indeed, the

issue presented herein is raised in a context that may make it more important than that in Whren because of the masses of undeniably innocent citizens affected by driver's license roadblocks. Certiorari should therefore be granted to consider the matters together. At the least, the Court may want to consider this case in light of the outcome of *Whren* and take appropriate action on it at that time.

Whren raises the question of whether law enforcement may, consistent with the Fourth Amendment, use pretextual reasons to make a stop, conduct a search, or effect a seizure. *Whren* involved an officer's stop of a vehicle for alleged traffic reasons, but the defendant claimed that the officer's true motivation was to investigate drug activity. The defendant argued that because the officers *would not* have made the stop absent the desire to investigate a drug violation, the stop was invalid. However, the circuit court held that the test for determining the validity of such a stop is not whether the officers *would have* made the stop but for an invalid reason, but whether the officers *could have* made the stop based on any asserted legitimate reason. Thus, the circuit court held that even if the officer's actual motivation for the stop was drug investigation without reasonable suspicion, so long as there had indeed been a traffic violation, the stop was lawful.

This Court granted review in *Whren* apparently to determine whether the proper analysis in pretext cases is the "*could have*" test, as several circuits utilize, or the "*would have*" test, as is utilized in other circuits. The instant case has some marked similarities and some important differences with

Whren, and depending on how the Court resolves this question and on how sweeping a decision it renders, the decision may impact substantially on the first question presented for review herein.

Should the Court adopt the "*would have*" test, as urged by the Petitioners in *Whren*, reversal of the decision below in this case would be required. After all, Respondents herein readily admit that they *would not* have stopped Petitioners but for their motivation to conduct dog sniffs. On the other hand, should the Court adopt the "*could have*" test, the decision may or may not require a particular result in this case, although the Court's reasoning is very likely to impact this case.

As was the case in *Whren,* Petitioners herein acknowledge that Respondents *could have* lawfully stopped them to conduct a driver's license check. However, there are several potentially important distinctions between this case and Whren: first, unlike the facts in *Whren*, there is no factual dispute in this case that Respondents *would not* have stopped Petitioners absent their unlawful motivation (Respondents have so conceded); second, the stops herein were roadblock stops and *not* based upon the reasonable suspicion standard; third, the pretextual decisions made in this case were made by agency heads, not officers in the field; and fourth, the scope of law enforcement action following the stops in each case was far different.

Because of the above distinctions, the circuit court's rationale in *Whren* does not apply to this case and this court's resolution of the issue may or may not apply to this case. More particularly, the circuit court in *Whren* reasoned that the "*could have*" test provides

"a more principled method of determining reasonableness" because it eliminates the need to evaluate the officer's subjective state of mind and it preserves the "reasonable suspicion" standard. 53 F.3d at 375-76. However, neither of these two reasons advanced to justify the *"could have"* test are applicable here.

The primary reason advanced by *Whren* for the *"could have"* test – to avoid the sometimes difficult inquiry into the officer's subjective state of mind -- is inapplicable here because *Respondents readily admit that their subjective motivation was to evade the law.* At least in a case where Respondents admit to their unlawful motive, the rationale of *Whren* makes little sense.

Second, the "*could have*" test cannot be justified here by strict enforcement of the reasonable suspicion standard -- as *Whren* suggests – because the stops in this case were *not* based upon reasonable suspicion. Indeed, if the "*could have*" test is adopted and it is allowed to be combined with unrelated doctrines that sometimes allow for searches and seizures without suspicion, such as driver's license roadblocks, there are then seemingly no controls to protect against the total abrogation of the Fourth Amendment by law enforcement.[1]

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[1] The facts of the case demonstrate that the approach followed by the circuit court in *Whren* is flawed. Most basically, the "*could have*" test applied by the D.C. Circuit is not a test for determining pretext but for excusing it. If the police lack even a facially plausible reason for stopping a vehicle, there is no need to claim pretext because reasonable suspicion is absent and the stop is therefore unconstitutional. The issue of pretext only arises when there is a facially plausible reason to conduct the

The third distinction between *Whren* and this case is the level of the decision-maker who sought to evade the law. Although the majority of the court below believed that an agency head should be free to engage in pretext, we have argued in our petition that pretextual actions by high ranking government officials are far worse than when committed by the officers in the field. *See* Petition at 16-17.

Finally, and perhaps most importantly, there is one other distinction between *Whren* and this case: the differences in the scope of the police action following the stop. In *Whren*, when the officers approached the car, they noticed drugs in the possession of an occupant. Thus, there was no additional action *initiated by the police* after the stop beyond what one would normally find in a traffic stop. Had the officers in *Whren* stopped the vehicle and immediately subjected it to a dog sniff, the outcome in *Whren* might have been quite different. This is so because of the well-settled principle that "an intrusion must be reasonably related in scope to the justification for commencing it." *Florida v. Royer*, 460 U.S. 491 (1983); *Warden v. Hayden*, 387 U.S. 294 (1967); *Terry v. Ohio*, 392 U.S. 1 (1968).

In two cases which have followed *Whren*, the courts have carefully circumscribed the "*could have*" test by requiring strict adherence to the principle that the police

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search but there is also reason to believe that the police are using the search to circumvent important Fourth Amendment safeguards. If the only question is whether some police officer "could have" stopped the defendant, every pretextual search will be sustained. In reality, therefore, the standard proposed by the circuit court in *Whren* can more fairly be described as a non-test.

action subsequent to the stop be justified by the circumstances of the stop. Thus, in *U.S. v. Botero-Ospina, 71 F.3d 783,788 (10th Cir. 1995)(en banc),* the Court explained:

> It goes without saying that, by adopting the standard we do today, we do not abandon the traveling public to "the arbitrary exercise of discretionary police power." Our holding in this case properly focuses on the very narrow question of whether the initial stop of the vehicle is objectively justified. We leave intact the vast body of law which addresses the second prong of the *Terry* analysis – whether the police officer's actions are reasonably related in scope to the circumstances that justified the interference in the first place. Our well-developed case law clearly circumscribes the permissible scope of an investigative detention. Therefore, if an officer's initial traffic stop, though objectively justified by the officer's observation of a minor traffic violation, is motivated by a desire to engage in an investigation of more serious criminal activity, his investigation nevertheless will be circumscribed by *Terry's* scope requirement.

(citations omitted). Similarly, in *U.S. v. Johnson,* 63 F.3d 242 (3rd Cir. 1995), the court applied to the "*could have*" test, but was quick to note the limitation imposed by the above principle:

> Furthermore, a traffic stop must be reasonably related in scope to the justification for the stop. *See Berkemer v. McCarthy,* 468 U.S. 420, 439 (1984) . . . . To justify a greater intrusion unrelated to the traffic stop, the totality of the circumstances known to the police officer must establish reasonable suspicion or probable cause to support the intrusion. Clearly, a lawful traffic stop is not "carte blanche" for an officer to engage in other unjustified action.

(citations omitted). Thus, it seems clear that had the officer in *Whren* made a pretextual traffic stop and then used a dog to sniff the vehicle and its occupants absent reasonable suspicion to do so, the dog sniff would represent an intrusion that cannot be justified by a minor traffic violation. Similarly, the dog sniffs in the instant case cannot be justified by the asserted need to check driver's licenses or vehicle safety. The fact that the post-stop conduct *initiated by the officer* in Whren did not go beyond what one would expect in a traffic stop distinguishes this case from that one.[2]

Thus, there are several important distinctions between this case and *Whren.* Nevertheless, the Court's decision in *Whren* could substantially impact on the decision herein. The adoption of the "*would have*" test would require reversal of this case. A sweeping decision which categorically adopts the

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[2] The defendant in Whren engaged in conduct after the stop that justified further police action. In this case, on the other hand, Petitioners engaged in no post-stop conduct to justify further police action.

"*could have*" test in all circumstances without regard to the factual distinctions between *Whren* and this case or the principle that "an intrusion must be reasonably related in scope to the justification for commencing it" would, on its face, arguably foreclose Petitioner's "pretext" argument raised in the first question presented. At the same time, the facts of this case demonstrate why a sweeping adoption of the "*could have*" test would not be sound. Because the two cases are so closely related and because of the importance of the questions presented, as this Court has acknowledged by the grant of certiorari in *Whren*, certiorari should be granted herein.[3]

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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MAY 1996

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[3] At the least, the Court should postpone consideration of this case pending the decision in Whren and dispose of it in accordance with that decision.